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SYMPOSIUM: PRIVATE LAW, PUNISHMENT, AND DISGORGEMENT

SYMPOSIUM EDITOR
ANTHONY J. SEBOK

- INTRODUCTION: WHAT DOES IT MEAN TO
SAY THAT A REMEDY PUNISHES? *Anthony J. Sebok* 3

- RESTITUTION'S OUTLAWS *Andrew Kull* 17

The usual assertion that "restitution is not punitive" is true in the important sense that liability in restitution does not exceed the defendant's enrichment: enhanced or exemplary liability is foreign to this area of the law. On the other hand, restitution incorporates an unmistakably punitive aspect that is given effect in a different fashion: not by enhancing the liability of a disfavored defendant, but by denying relief to a disfavored claimant. The traditional explanation of such outcomes (by recitation of English and Latin maxims) has tended to obscure the extent and the consistency of the law's punitive response.

- OPTIMAL PENALTIES IN CONTRACTS *Aaron S. Edlin
and Alan Schwartz* 33

Contract law's liquidated damage rules prevent enforcement of contractual damage measures that require the promisor, if it breaches, to transfer to the promisee a sum that exceeds the net gain the promisee expected to make from performance; but these rules permit the promisor to transfer less than the promisee's expectation. We define a contractual damage multiplier as any number between zero and infinity by which the promisee's expected gain—its expectation interest—is multiplied. Multipliers of one or less thus comply with the liquidated damage rules while multipliers that exceed one do not; the high multipliers are unenforceable penalties. This Paper shows that multipliers of any size can be efficient or inefficient, depending on the parties' purposes in creating them. For example, a multiplier that exceeds one will decrease welfare if used by a seller with market power to deter entry, but will increase welfare if used by parties to induce efficient relation specific investment. As a consequence, a court should inquire, not into the size of the multiplier, but into the purpose the multiplier serves for the parties. The practical implication of this view is that it no longer should be a sufficient defense to an action to enforce a contractual damage measure that the parties' multiplier exceeded one.

This Paper examines contract remedies, especially damage awards that are punitive or restitutionary, from the standpoint of corrective justice. The function of the damage award in corrective justice is to undo, so far as possible, the defendant's violation of the plaintiff's right. Because the nature of the right determines the nature of the remedy, a discussion of contract damages requires elucidation of the right infringed by a breach of contract. Drawing on Kant's now almost forgotten discussion of contractual rights, the Paper sketches the relationship between the promisee's right to contractual performance and expectation damages, which give the promisee the value of that right. The Kantian account of contractual right not only justifies expectation damages as compensatory in accordance with corrective justice (thus resolving the perplexity about expectation damages formulated by Fuller and Perdue), but also discloses the inaptness of requiring the disgorgement of gains resulting from contract breach. Turning then to punitive damages, the Paper addresses the question of how corrective justice and punishment—and the institutions devoted to them—coexist, and how they are differentiated in a legal order based on rights. It then discusses the difficulties that emerge from the elaborate but ultimately unsatisfying recent attempt by the Supreme Court of Canada to work out a coherent treatment of punitive damages for contract breach.

PUNITIVE DAMAGES IN AMERICAN AND GERMAN LAW —
TENDENCIES TOWARDS APPROXIMATION OF
APPARENTLY IRRECONCILABLE CONCEPTS

Volker Behr 105

Nineteenth-century debate on punitive damages has led to an apparently unbridgeable gap between American and German concepts of damages. While the American system stayed dualistic, allowing compensatory damages and punitive damages, the German system has become monistic, exclusively allowing compensatory damages. The gap grew deeper as, in America, punitive damages awards skyrocketed, and in Germany the monistic system, reckoned under German public policy, has barred American punitive damages awards from enforcement. According to the author's opinion, recent develop towards capping punitive damages in America and towards awarding damages which are punitive in Germany may bridge this gap.

WHAT DID PUNITIVE DAMAGES DO?
WHY MISUNDERSTANDING THE HISTORY OF
PUNITIVE DAMAGES MATTERS TODAY

Anthony J. Sebok 163

In 2001 the Supreme Court, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, suggested that, although modern punitive damages punish, in earlier times they almost exclusively compensated for noneconomic damages that were ignored by a less progressive legal system. This Article demonstrates that the historical foundation upon which the Supreme Court bases its argument is groundless. In the eighteenth and nineteenth centuries punitive damages served a number of functions, but none of them were to provide the noneconomic damages identified by the court. Instead, as the Article shows, the sort of injuries for which punitive damages were once demanded would still be uncompensated by contemporary doctrines of compensatory damages. This Article uses the Court's confused analysis in *Cooper* to demonstrate that the dichotomy upon which it relied—that, in the law of punitive damages, punishment and compensation are mutually exclusive categories—is neither historically accurate nor analytically necessary.

THE INCOHERENCE OF PUNISHMENT
IN ANTITRUST

Spencer Weber Waller 207

Antitrust has a complex set of criminal and civil remedies enforced by a multiplicity of public and private actors. Antitrust remedies are frequently analyzed from the

point of view of deterrence and compensation, but only rarely from the perspective of punishment. The few debates about punishment concern whether defendants are over-punished or under-punished. This Article analyzes a different question about punishment in antitrust—namely that total punishment in any given antitrust case varies dramatically for offenses with identical or similar status under the law and there is no *a priori* way to predict punishment levels for a particular case or a particular defendant. This is the real but overlooked incoherence of antitrust punishment which has real consequences both for antitrust and for tort scholars looking to antitrust as a model of certainty in questions of punishment and damages.

CAN TORT JURIES PUNISH COMPETENTLY?

(REVIEW OF SUNSTEIN ET AL.,

PUNITIVE DAMAGES)

Neal R. Feigenson 239

Punitive damages have prompted much academic and political debate during the last twenty years. In their recent book *Punitive Damages*, Cass Sunstein, Reid Hastie, John Payne, David Schkade, and W. Kip Viscusi present some twenty experimental studies that, they argue, show that juries award punitive damages too often, that the amounts they award are erratic and unpredictable, and that their decision-making processes are prone to various cognitive biases and other irrationalities, displaying a particular disregard of the principle of optimal deterrence. While the book offers much reliable and valuable data on how juries think about punitive damages, the authors frequently describe their results tendentiously, downplaying or omitting considerations that would support alternative interpretations of the data. Most importantly, by emphasizing deterrence to the exclusion of the retributive function that punitives are widely thought to serve, the authors present an unduly pejorative picture of juries' punitive damages decision making and overstate the need for reforming the process.

KENNETH M. PIPER LECTURE

IMMIGRATION AND THE WORKPLACE:

IMMIGRATION RESTRICTIONS AS

EMPLOYMENT DISCRIMINATION

Howard F. Chang 291

In this article, I analyze restrictions on immigration to the United States as a form of government-mandated employment discrimination against aliens. Through our immigration laws, we deny aliens access to valuable employment opportunities that are open to natives. Under our immigration and nationality laws, we base this discrimination explicitly on circumstances of birth beyond our liberal ideals of equality, which require a cosmopolitan perspective that extends equal concern to all individuals. Furthermore, even if we assume a less demanding moral theory that allows us to give the interests of natives priority over the interests of aliens, it remains difficult to justify the employment discrimination required by our laws as ideal policies unless we consider the satisfaction of segregationist preferences to be a justification. The role of intolerance in supporting the adoption of immigration restrictions underscores a second sense in which the discrimination they embody violates our liberal ideals. We may promote the interests of natives, however, by restricting the access of unskilled alien workers to public benefits and to citizenship, which suggests liberalized guest-worker programs as a component of immigration reform. From the cosmopolitan liberal perspective, such programs would represent only a second-best improvement over the status quo, but worth supporting given constraints that make more ideal policies politically infeasible.

THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

INFORMING WORKERS OF THE RIGHT TO WORKPLACE REPRESENTATION: REASONABLY MOVING FROM THE MIDDLE OF THE HIGHWAY TO THE INFORMATION SUPERHIGHWAY

G. Micah Wissinger 331

The National Labor Relations Act gives American workers the right to workplace representation, yet many workers do not exercise this right because they lack the information necessary to make an informed decision during a union's organizing campaign and subsequent election. The rules of union access to employer property prevent organizers from reaching workers with meaningful information. In an effort to balance a union's access to workers, unions are given the names and addresses of the workers they seek to organize. Although achieving balance was a goal of introducing home visits to the representation campaign, unions are nonetheless still at a clear disadvantage in reaching workers with information. This Article recommends technology as a partial remedy to the imbalance in representation campaigns through the use of e-mail and Internet web sites. It recommends that employers provide unions with e-mail addresses of workers who have access to e-mail and it suggests that employers post notices of union Internet web sites. Through the use of technology more employees can receive the information necessary to effectuate their right to organize in the workplace.

RECOGNITION OF LABOR UNIONS IN A COMPARATIVE CONTEXT: HAS THE UNITED KINGDOM ENTERED A NEW ERA?

Jared S. Gross 357

Unlike union recognition in the United States, trade union recognition in the United Kingdom has traditionally been based on voluntary agreements between labor and management. Times have changed, and the unions that embraced voluntary recognition have increasingly pushed for a statutory recognition scheme that mandates recognition when the majority of employees so wish. Prompted by this new support for statutory recognition, the Labour Party, which took control of Parliament in 1997, enacted a statutory recognition scheme in the new Employment Relations Act 1999. After analyzing the technical aspects of union recognition in the United Kingdom in light of the scheme that has governed American labor law for more than a half century, the National Labor Relations Act, this note asks and answers why did the United Kingdom enact such legislation. The author proposes that the Employer Relations Act will not be a new dawn for unionism, rather it is only a basement of protection for employers who would refuse recognition under any circumstance.

LEVITZ FURNITURE CO.: THE END OF CELANESE AND THE GOOD-FAITH DOUBT STANDARD FOR WITHDRAWING RECOGNITION OF INCUMBENT UNIONS

Sarah Pawlicki 381

In 1998, the Supreme Court upheld the NLRB's unitary good-faith doubt standard in *Allentown Mack v. NLRB* for withdrawing recognition of an incumbent union, polling employees, or an employer petition for decertification. The Court's holding gave the NLRB broad deference as an administrative agency to develop its rules and standards. At the same time, the Court rebuked the NLRB for its use of the term "good-faith" when in fact, the NLRB required much more. In response, the NLRB issued its decision in *Levitz Furniture Company*. *Levitz* was the NLRB's opportunity to change the rule from *Celanese*, which for fifty years permitted employers to withdraw recognition of an incumbent union based upon a good-faith doubt of the union's continued majority status. Employers had relied upon this fifty-year-old precedent as

the standard for a unilateral withdrawal of recognition. In one stroke of the pen, the NLRB overturned *Celanese*. However, arguably the rules had been changed long before, through the NLRB's interpretation of the standard of "good-faith" doubt. Through analysis of the development of the good-faith doubt standard and the Supreme Court's holding in *Allentown Mack*, an attempt is made to determine the future of an employer's unilateral withdrawal of recognition as affected by *Levitz*.

STUDENT NOTES

UNITED STATES V. DUSENBERY: SUPREME COURT SILENCE AND THE LINGERING ECHO OF DUE PROCESS VIOLATIONS IN CIVIL FORFEITURE ACTIONS

David F. Benson 409

Civil forfeiture, the process whereby all property "substantially connected" to illegal activity is forfeited to the United States government, plays an integral role in the United States criminal justice system, as it ensures that individuals do not profit from crime, and the proceeds from such actions help to finance the war on drugs and build new prisons. Because civil forfeiture encroaches upon an individual's use and possession of property, Congress has established detailed procedures, including a notice requirement and the right to judicially contest the civil forfeiture action, that must be strictly followed before the Government is entitled to claim the property in question. Against this background, this Comment evaluates the current split amongst the United States Courts of Appeals regarding the issue of how to resolve civil forfeiture actions in which due process has been violated because the defendant did not receive proper notice of an administrative forfeiture proceeding, and the statute of limitations for filing a judicial forfeiture action has expired when the government becomes aware of this fact. Specifically, this Comment criticizes the Sixth Circuit's recent decision, *United States v. Dusenbery*, in which the court concluded that the proper remedy is to restore the claimant's right to judicially contest the forfeiture action and to put the government to its proofs under a probable cause standard, and argues that the Supreme Court of the United States should have granted Dusenbery's petition for writ of certiorari and reversed the Sixth Circuit's decision in *Dusenbery* because the reasons the majority cites to buttress its holding have no foundation in the law.

FEDERAL FUNDING OF HUMAN EMBRYO STEM CELL RESEARCH: ADVOCATING A BROADER APPROACH

Jason R. Braswell 423

This Note, as one may surmise from the title, advocates a broader approach to federal funding of human embryo stem cell research. It begins with a look at the science of embryo stem cells and examines the medical promise that stem cell technology holds. It also briefly addresses the controversy that surrounds embryo stem cells. The Note then looks at why federal funding is so important to embryo stem cell research and how federal funding for embryo stem cell research is currently handled. Examination of current federal funding methodology leads to several concerns which are addressed, including property rights, flight of scientists to greener pastures, limited diversity of embryo stem cell lines, and xenotransplantation issues. The Note concludes that while the current approach to federal funding of embryo stem cell research is a step in the right direction, it still needs to be broadened. If American taxpayers are going to fund embryo stem cell research, it should be done in a way that allows those taxpayers to reap the maximum benefit from the research.

REMOVING THE BLINDERS IN FEDERAL SENTENCING:
CULTURAL DIFFERENCE AS A PROPER
DEPARTURE GROUND

Kelly M. Neff 445

Although the Federal Sentencing Guidelines have strived to standardize the sentencing ranges applicable to similarly situated defendants, the Supreme Court has affirmed that the guidelines have not usurped all the sentencing discretion of trial judges. Thus, if a trial judge notices a mitigating or aggravating factor, a judge will examine the factor to determine whether it is an encouraged, discouraged, or forbidden departure ground and then decide whether and how it should affect the defendant's sentence. Many defendants have argued that their cultural beliefs, which may tend to mitigate their mens rea or probability of recidivism, render them distinct from the average offender of the particular crime and therefore should be considered as a mitigating factor when determining their sentence. Many judges have agreed that culture is relevant in sentencing and have departed in cases where defendants pled that their assimilation to American norms and mores warranted consideration. In stark contrast, judges have not allowed similar departures for those that have maintained cultural beliefs distinct from that of the American majority. Although culture is not an explicitly proscribed sentencing factor in the guidelines, courts have resisted using culture in the latter context due to the fear that cultural considerations in those situations was too akin to forbidden sentencing considerations such as race, religion, creed, and national origin. A thorough examination of what culture entails evidences that culture is distinct from those prohibited areas. Thus, courts should recognize and uphold our nation's ideals of cultural pluralism and diversity, and resolve this sentencing disparity in favor of downward departures for cultural difference claims.